

To: Daugherty, Steven A CIV NAVFAC Pacific, 09C (b) (6)
Cc: Ahuna, Andre CIV NAVSUP FLCPH, Code 03 (b) (6); Yee, Corinne S CIV NAVFAC HAWAII (b) (6); Diliberti, James J DLA CIV GENERAL COUNSEL (b) (6); Whitacre, Jan M CIV NAVSUP FLC Pearl Harbor (b) (6); Hommon, Rebecca M CIV CNRH, N00L (b) (6); Reynolds, Rebekah [Reynolds.Rebekah@epa.gov]
From: Wade.H.Hargrove@hawaii.gov
Sent: Tue 11/3/2015 9:14:00 PM
Subject: RE: Red Hill Third Party NDA

In an effort to be succinct:

I have obviously been a little out of the loop on this one, but I don't see why we are trying to reinvent the wheel here. The advisement we give to expert contractors working for the EPA and DOH should be modelled after the "advice letter" that I gave my DOH employee clients already. In other words, I object to this being characterized as an "NDA" and we need to stop using that language. I strongly feel that it is in everyone's interest to stop characterizing it that way because it destroys the image of transparency we are all trying to promote. An no government employee or contractor has any business signing an "agreement" with the entity they are regulating. That is inappropriate from a regulatory point of view and also from the "PR" perspective. That is why the document was created for DOH employees that avoids any of the "agreement" language. It is, instead, an advisory that state employees are subject to applicable federal law, which, of course, they are.

So this document should mirror more closely the document Steven and I worked out for DOH employees (it would be an advisory from DOH/EPA to the contractors). Government contractors, like DOH employees, are subject to applicable federal law. They are in service of the EPA and DOH and should receive the same treatment. And they should not sign something that suggests it is some kind of agreement (for which I think there is questionable authority anyway). I think this solves Steven's FOIA concern because you don't need to mention that issue at all if all you are doing is informing them of their obligation to comply with the law.

I am already fielding inquiries about the "Non-disclosure agreements" that people are signing with the Navy. Thanks to the work Steve and I already did, I can accurately say there are no "Non-disclosure agreements" between the DOH and Navy. Please don't create them for DOH/EPA contractors or I will have to start qualifying my answers. I don't want to do that and it isn't in our collective best interest to have to do so.

I am happy to discuss this.

- Wade

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From: "Daugherty, Steven A CIV NAVFAC Pacific, 09C" <(b) (6)>
To: "Reynolds, Rebekah" <Reynolds.Rebekah@epa.gov>, "Wade.H.Hargrove@hawaii.gov" <Wade.H.Hargrove@hawaii.gov>
Cc: "Diliberti, James J DLA CIV GENERAL COUNSEL" <(b) (6)>, "Hommon, Rebecca M CIV CNRH, N00L" <(b) (6)>, "Ahuna, Andre CIV NAVSUP FLCPH, Code 03" <(b) (6)>, "Whitacre, Jan M CIV NAVSUP FLC Pearl Harbor" <(b) (6)>, "Yee, Corinne S CIV NAVFAC HAWAII" <(b) (6)>
Date: 11/02/2015 05:36 PM
Subject: RE: Red Hill Third Party NDA

Rebekah,

As mentioned in my prior message, a revised 30Oct draft of the NDA including the addition of "Nothing in this document limits my rights to request information under the Freedom of Information Act or restricts the use of information obtained through the Freedom of Information Act" is attached for discussion purposes. However, our preference would still be for use of the 29Oct version, with any reference to rights under FOIA to be conveyed separately either orally or in the EPA/DOH cover letter.

We have several concerns with the addition:

First, we have never seen FOIA preservation of rights language in an NDA and do not believe that it is a good precedent.

Second, it should be noted that this form will be used for more than just BWS, and while BWS may not be very likely to have commercial interests in the planned procurements, some of the other possible third party SME's might be more likely to have such interests or to discover that they have such interests after participation in the AOC process, we believe that there might be procurement integrity act issues involved if an entity with a commercial interest in the planned procurements were to attempt to use the FOIA to obtain release of information that they would have no knowledge of absent their participation as a SME under the AOC.

Third, use of this FOIA language almost seems like an invitation for the BWS and other SME's to participate in the AOC process in bad faith to gain knowledge and then request documents from the Parties that they might not know about if they were not at the table.

Fourth, although BWS is fully aware of its rights under FOIA, and would no doubt submit FOIA requests with or without the language, other SME's, and other individuals who may see the NDA if BWS publicizes it as we expect, may not be as aware of FOIA as the BWS, and inclusion of the language may result in additional and possibly burdensome FOIA requests that might otherwise not be interjected into the AOC process. All of the Parties have limited resources, and time spent in dealing with these additional requests would be better spent working on substantive issues.

We would appreciate an opportunity to discuss further before a decision is made. I will be in meetings from about 0830 to 1200 HI time tomorrow, but will try to call you in my early morning or early afternoon.

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC

(b) (6)

-----Original Message-----

From: Reynolds, Rebekah [mailto:Reynolds.Rebekah@epa.gov]
Sent: Friday, October 30, 2015 2:36 PM
To: Daugherty, Steven A CIV NAVFAC Pacific, 09C
Cc: Wade.H.Hargrove@hawaii.gov
Subject: RE: Red Hill Third Party NDA

Steven,

Can there be a statement along the lines of "rights under FOIA are not waived?". My program thinks that such a statement might ease acceptance of the agreement.

Best,

Rebekah Reynolds
Assistant Regional Counsel
Office of Regional Counsel
Environmental Protection Agency - Region 9
(415) 972-3916

-----Original Message-----

From: Daugherty, Steven A CIV NAVFAC Pacific, 09C
(b) (6)
Sent: Friday, October 30, 2015 5:00 PM
To: Reynolds, Rebekah
Cc: Wade.H.Hargrove@hawaii.gov
Subject: Red Hill Third Party NDA

Rebekah,

As requested, the third party NDA we are requesting is attached. I confirmed with my clients that they believe that since the SME's are being invited by EPA/DOH it is appropriate for EPA/DOH to provide the NDA to the SME's.

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC
(b) (6)

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[attachment "NDA - Third Party Subject Matter Expert 30Oct2015ver.pdf"
deleted by Wade H Hargrove/AG/StateHiUS]